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Batson v. Kentucky: The New and Improved Peremptory Challenge

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Notes

Batson v. Kentucky: The New and Improved Peremptory Challenge

The Supreme Court decision in *Batson v. Kentucky*[1] promises to have a profound and positive effect on jury selection in criminal trials. In *Batson,* the Court addressed the racially discriminatory use of peremptory challenges for the first time since 1965. The *Batson* decision applies modern equal protection analysis to the prosecutor's use of the peremptory challenge to exclude members of the defendant's race from his jury, and sets up a new standard by which the defendant may make a claim of purposeful discrimination.

Until *Batson,* a defendant had to prove systematic and consistent exclusion of potential jurors because of their race.[2] This requirement was understood by the *Batson* Court to mean, for example, that the prosecutor must have consistently excluded every black juror in a black defendant's trial before the Court would invalidate the prosecutor's action under the equal protection clause.[3] In practice, therefore, the prosecutor was almost completely free to exclude jurors who shared the defendant's race without constitutional scrutiny.

Batson drastically changes the framework for analyzing the prosecutor's exercise of peremptory challenges. The Court held that a defendant could establish a prima facie case of purposeful racial discrimination solely by evidence of the prosecutor's actions at his trial. The *Batson* test requires the defendant to show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove members of that group. The defendant must further show that the facts and other relevant circumstances raise an inference of exclusion based on race. If he does raise such an inference, the burden of persuasion will shift and the trial court will require the prosecutor to come forward with a racially neutral reason for the challenges.[4]

Because the peremptory challenge is not a constitutional right, the *Batson* Court appropriately curtailed its use despite the fact that its role as a tool for selecting an impartial jury is now more limited. By limiting

1. 106 S. Ct. 1712 (1986).
2. *See* Swain v. Alabama, 380 U.S. 202, 227 (1965).
3. *Batson,* 106 S. Ct. at 1720 & n.17.
4. *Id.* at 1722-24.

the use of the peremptory challenge, the Court has necessarily changed the meaning of the challenge. No longer truly "peremptory," the challenge is now limited to constitutionally permissible uses.

The *Batson* test leaves some questions unanswered, and does not provide complete protection to a defendant against discriminatory jury selection. The first problem with the decision is its apparently limited application to instances in which the defendant and the challenged jurors are of the same race. Consequently, instances in which the juror does not share the defendant's race, but is nevertheless excluded for impermissible racial reasons, would escape scrutiny under *Batson*. Such a limitation undercuts the basic principle underlying the decision; according to the Court, not a single instance of purposeful discrimination should escape equal protection scrutiny. Second, this requirement also apparently limits standing to racial minority defendants since the defendant must belong to a cognizable racial group, while ignoring the problem of discrimination against jurors who because of their race are denied service in a trial not involving a minority defendant. Finally, the decision leaves many unanswered questions regarding the appropriate implementation of the rule. This Comment proposes an interpretation of the decision that gives full effect to the reasoning and purpose of the holding and the underlying constitutional doctrine.

Section I briefly describes jury selection procedures in criminal trials and traces the history of the peremptory challenge. Discussion of the purpose of the challenge in criminal trials today provides a basis for understanding the limitations imposed by *Batson*.

Section II summarizes the constitutional doctrines affecting the use of the peremptory challenge as applied before the *Batson* decision. Part A discusses the previous minimal protection from discriminatory use of the challenge provided under the equal protection clause. Part B addresses limitations placed on the challenge under the sixth amendment guarantee of an impartial jury.

Section III presents the *Batson* decision itself. Section IV focuses on the rationale supporting the decision and how *Batson* fits into modern equal protection analysis. Section V addresses the logical inconsistencies and the questions the Court failed to answer. The Comment concludes by suggesting appropriate responses by trial and appellate courts to equal protection claims raised because of the prosecutor's racially discriminatory use of the peremptory challenge.

I. Understanding the Peremptory Challenge

This section analyzes the function, purpose, and history of the peremptory challenge. An understanding of the function of the peremptory challenge in criminal trials provides the initial basis for analyzing *Batson*.

A later discussion examines the challenge in light of its purpose and long history in criminal procedure.

A. Jury Selection Procedures

Jury selection in criminal trials typically proceeds in several stages.[5] First, a list of prospective jurors is compiled, usually from voter registration lists. Theoretically, this group of prospective jurors represents a cross-section of the community in which the defendant is to be tried. Next, the attorneys or the judge,[6] depending on the jurisdiction, question the prospective jurors to disclose bias about the case that could threaten the juror's impartiality.[7] It is during this process, known as *voir dire,*[8] that cause and peremptory challenges are exercised. Challenges for cause are unlimited in number and may be exercised only when the potential juror shows a specific or relevant nonspecific bias.[9]

Peremptory challenges, however, do not require a showing of specific or relevant nonspecific bias. They are limited in number depending on the crime charged, with more challenges allowed as the seriousness of the crime increases. A party uses peremptory challenges as a strategic method for obtaining a jury more sympathetic to its position, or at least not sympathetic to the opposition.[10] Peremptory challenges most often are used when the attorney suspects that a potential juror cannot be impartial, but cannot prove a basis for the exercise of a challenge for cause.[11]

In the typical jury selection system, after an individual juror is questioned, the attorneys challenge for cause or exercise a peremptory challenge before moving on to the next juror. Under this system, an attorney must use peremptories carefully, in case the challenged juror is replaced with an even less desirable juror who also cannot be successfully challenged for cause. In contrast, under the "struck" jury system employed in some jurisdictions, the cause challenges are used first, leaving a group of jurors equal to the number of jurors necessary (usually twelve) plus the number of peremptory challenges available to both sides. The per-

5. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURY PANELS 85-175 (1977).

6. *See, e.g.,* FED. R. CRIM. P. 24.

7. *See infra* note 22.

8. *Voir dire* tranlates to mean "to speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

9. J. VAN DYKE, *supra* note 5, at 140-45. A specific bias may arise from a relationship with the defendant, the prosecutor, or witnesses, or from a preconceived opinion as to the defendant's guilt. A relevant nonspecific bias would arise, for example, from strong characteristics of the juror relating to a particular race or religion, where race or religion is significant in the case to be tried.

10. *Id.* at 145-47; *see also* R. WENKE, THE ART OF SELECTING A JURY 46-50 (1979).

11. S. Salzburg & M. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation,* 41 MD. L. REV. 337, 340-41 (1982).

emptory strikes may then be used to eliminate those persons undesirable to either side, allowing each attorney to manipulate the composition of the jury with knowledge of who will remain after the peremptories are exercised. Thus, each side will first examine all potential jurors for cause and then choose the most desirable of the remaining pool of jurors by exercising all its peremptory challenges at once against those it feels are less favorable to its side.[12]

Under either system, the potential for racially discriminatory abuse of the peremptory challenge was essentially uncontrolled until the *Batson* decision. A brief review of the historical origin and purpose of the challenge system, and its purpose today, provide a basis for understanding the import of *Batson.*

B. History of the Peremptory Challenge

Early English history of the peremptory challenge shows that its original purpose was to satisfy the defendant.[13] Since 1305, the Crown has been required to show cause for every challenge.[14] Defendants, however, have retained "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[15]

The American states accepted the defendant's peremptory challenge as part of the common law.[16] By the nineteenth century, prosecutorial peremptory challenges became common in the states.[17] In an opinion by Justice Field, the United States Supreme Court upheld the prosecutor's use of peremptory challenges, defending it as necessary to secure compe-

12. J. VAN DYKE, *supra* note 5, at 146-47.

13. *See generally id.* at 146-150 (early history of English jury selection).

14. Early English juries were chosen by the Crown, which had an unlimited number of challenges. This unlimited right was withdrawn in 33 Edw. 1, ch. 2 (1305) (current version at The Juries Act, 1825, 6 Geo. 4, ch. 50, § 29). The Crown later acquired the right to "stand aside" an unlimited number of potential jurors until the panel was exhausted. "Standing aside" was similar to challenging peremptorily in that a reason did not need to be given, but differed in that it did not guarantee that the particular juror would not be allowed to sit on the jury. If 12 jurors did not remain after the defendant and the Crown had both stood aside those jurors they found objectionable, the potential jurors rejected by the Crown were recalled to serve on the jury, unless the Crown could show cause. J. VAN DYKE, *supra* note 5, at 146-50.

15. 4 W. BLACKSTONE, COMMENTARIES *353.

16. J. VAN DYKE, *supra* note 5, at 148-49. Some states protested the practice of "standing aside" and denied the government any challenges to jurors other than for cause, while others allowed "standing aside" or a limited number of peremptory challenges. Congress granted peremptory challenges to defendants in federal courts in the Act of Apr. 30, 1790, § 30, 1 Stat. 112, 119 (current version at FED. R. CRIM. P. 24), but did not mention the prosecution's right to peremptories. Shortly thereafter, the Supreme Court determined that the practice of "standing aside" was part of the common law, and hence was the law in the United States. United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827).

17. J. VAN DYKE, *supra* note 5, at 150.

tent and impartial jurors.[18]

Thus, what originated in 1305 primarily as the defendant's weapon against the sometimes overzealous state became a system of challenges for attaining an impartial jury for both the defense and the prosecution.[19] And so, until the *Batson* decision, the system operated by giving both the defendant and the prosecution the right to challenge potential jurors "without a reason stated, without inquiry and without being subject to the court's control."[20]

C. Purpose of the Peremptory Challenge

Even though the peremptory challenge is not constitutionally required,[21] the Supreme Court has long recognized that it serves an important function: the challenge is widely accepted as an essential means for achieving an "impartial" jury.[22] In this regard, the challenge not only furthers the ideal that a jury should be fair and impartial, but also helps to give the *appearance* of impartiality to the defendant.[23] Under this rationale, because the peremptory challenge allows the defendant to "choose" his jury, he should accept the verdict as impartial, fair, and just, whatever the outcome may be.[24]

The peremptory challenge also allows attorneys to avoid the explicit expression of "what we dare not say but know is true more often than not."[25] It prevents public expression of class and group bias, both of which play an essential role in the selection of jurors. For example, at-

18. Hayes v. Missouri, 120 U.S. 68, 70-71 (1887).

19. *See* Comment, *A Constitutional Blueprint for the Perpetuation of the All-White Jury,* 52 VA. L. REV. 1157, 1172-73 (1966). The Comment questions whether the practice of "standing aside" should be equated with the right to peremptory challenges, as Justice White appeared to do in Swain v. Alabama, 380 U.S. 202, 213 (1965).

20. *Swain,* 380 U.S. at 220.

21. First stated in Stilson v. United States, 250 U.S. 583, 586 (1919), the proposition that the challenge is not a constitutional requirement has never been questioned. *Batson,* 106 S. Ct. at 1720; *Swain,* 380 U.S. at 219.

22. "Impartial" can have many meanings in the jury trial context. To Lord Coke, an impartial juror was "indifferent," 1 COKE, COMMENTARIES UPON LITTLETON *§ 155b, a meaning adopted by the Supreme Court. Irvin v. Dowd, 366 U.S. 717, 722 (1960). But this must mean that the juror is indifferent toward conviction or acquittal of the defendant in the particular case, because it is impossible to find 12 jurors who have *no* opinions that will influence their decision. Procedures that assure a "fair possibility for obtaining a representative cross-section of the community," Williams v. Florida, 399 U.S. 78, 100 (1970), result in an "impartial jury." *See also* Peters v. Kiff, 407 U.S. 493, 501-03 (1972) (jury selection procedures must not create the appearance of bias); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 550-51 (1975) (an impartial jury, drawn from a cross-section of the community, assures that a range of biases and experiences will bear on the outcome of the case).

23. Babcock, *supra* note 22, at 552.

24. *Id.*

25. *Id.* at 553-54.

torneys regularly rely on factors such as occupation, economic status, sex, age, and appearance, as well as race, when evaluating a potential juror.[26] But expression of these criteria in terms necessary for cause challenges "would undercut our desire for a society in which all people are judged as individuals."[27] The peremptory challenge is thus a nicety for disguising socially unpopular prejudices, rationalized as a necessary tool for choosing what appears to be a "fair" jury.

The peremptory challenge also supplements the more restricted cause challenge, enabling the attorney to excuse a juror he suspects but cannot prove to be biased. Probative questioning of a potential juror that does not lead to a basis for a cause challenge may make the juror hostile to the questioning attorney. The peremptory challenge allows the attorney to dismiss such a hostile juror, thus permitting aggressive *voir dire*.[28]

II. Constitutional Doctrines: The Use of the Peremptory Challenge Before *Batson*

Judicial limitations of the peremptory challenge have been constitutionally based in the equal protection clause and the sixth amendment guarantee of trial by an impartial jury drawn from a cross-section of the community. Until *Batson,* however, limits under the equal protection clause were negligible. Because the Supreme Court had failed to address adequately the issue of racially discriminatory challenges, state and circuit courts attempted to provide greater protection to defendants under sixth amendment principles.

A. Equal Protection Analysis

Until the *Batson* decision, the constitutional authority for challenging the racially discriminatory use of the peremptory challenge was *Swain v. Alabama.*[29] In *Swain,* the Supreme Court held that the equal protection clause placed some limits on misuse of the challenge. These limits were illusory, however, because the decision placed an insurmountable burden of proof on the defendant who challenged such abuse.[30] Before discussing *Swain,* it is helpful to briefly review the general fourteenth amendment equal protection doctrine as developed by the Court.

The equal protection clause[31] prohibits governmental acts that bur-

26. *See* R. WENKE, *supra* note 10, at 62-65.

27. Babcock, *supra* note 22, at 553.

28. *Id.* at 554-55.

29. 380 U.S. 202 (1965).

30. *See infra* notes 42-50 and accompanying text.

31. The equal protection clause of the fourteenth amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

den rights or deny benefits because of arbitrary classifications.[32] If based on race or national origin, a classification is termed "suspect" and will be upheld only if that classification is necessary to achieve an end so compelling that it justifies the limitation of fundamental constitutional values.[33] A law that fails the strict scrutiny test because of its application in a particular case will not necessarily be stricken in its entirety; instead, only the particular invidious outcome need be invalidated. Similarly, the peremptory challenge need not necessarily be stricken in its entirety. Rather, the particular impermissible use of the challenge may be declared unconstitutional. Thus, the equal protection clause is a potentially powerful tool for examining the results of racially discriminating uses of peremptory challenges.

The most difficult aspect of challenging a particular governmental action that may be racially discriminatory is proving that government officers are applying the law differently to particular groups by classifying members according to a "suspect" trait.[34] Because it is very difficult to ascertain whether the government official is using suspect criteria in his appliction of the law, the Court has held that statistical proof is relevant to determining the existence of discrimination on the basis of suspect classifications.[35] Overwhelming statistical evidence showing disproportionate impact on a class may establish a prima facie case of unconstitutional classification. Because the criteria used for selecting the jury pool is often subjective, statistical evidence has been frequently used in jury selection cases.[36] Jury selection procedures at the jury pool stage have been held unconstitutional when the statistics showed racially disproportionate results or when the statistics indicated that the selectors were us-

32. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 521-801 (3d abr. ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1028 (1977). The equal protection clause does not, however, deny the government the ability to "draw lines" to classify persons; it guarantees only that such classifications will not be based on impermissible criteria or arbitrarily burden a group of individuals. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 525. When the law is applied in such a way as to create a class that is treated differently, the Court analyzes whether such a classification violates the equal protection clause. *Id.* at 526; L. TRIBE, *supra*, at 1025.

The classification may be invalid "on its face" or in its application. A classification is invalid "on its face" when it expressly dictates that a group may not receive its benefits—for example, a statute stating that only men may serve on juries. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 523 (1975). A law invalid in its application is one that is applied in such a way that it burdens a group, or denies benefits to it, on the basis of an impermissible criterion. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (law prohibiting wooden buildings for hand laundries violated the equal protection clause because all Chinese persons owning such laundries were forced to give up their laundry businesses, while all non-Chinese were exempted).

33. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 32, at 530.

34. *Id.* at 543.

35. *Id.* at 544; L. TRIBE, *supra* note 32, at 1026.

36. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 30, at 545.

ing their discretion in a racially discriminatory manner.[37]

Before *Batson,* an equal protection claim of unconstitutional discrimination through the use of the peremptory challenge required a great deal of statistical proof. In *Swain v. Alabama,*[38] an all white jury convicted the petitioner, a black man, of rape. Of the eight black persons on the petit jury venire, two were exempt and six were struck by the prosecutor. The petitioner objected to the composition of the jury on three theories, all based on equal protection principles:[39] the selection of the venire violated the principles of *Strauder v. West Virginia;*[40] the prosecutor purposely exercised the peremptory challenge in the petitioner's case in a racially discriminatory manner; and the prosecutors in the county had "consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury."[41] The Supreme Court rejected all three theories, refusing to invalidate the prosecutor's use of the peremptory challenge. Pertinent to the discussion of *Batson* is the rationale behind the second and third theories addressed in *Swain.*

The history of the challenge system and its purpose of obtaining a fair and impartial jury[42] provided the Court with a justification for denying Swain's claim of discrimination by the prosecutor.[43] The *Swain* Court held that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury,"[44] and the presumption is not overcome by evidence of the prosecutor's action at any particular trial. Apparently, the only conceivable way to prove an allegation of discrimination under this standard would be to obtain the prosecutor's admission that he had used the strikes in a purposely discriminatory manner that was not aimed at achieving a fair and impartial jury.[45]

The *Swain* Court agreed that the petitioner's third argument raised

37. *Id. See, e.g.,* Castenada v. Partida, 430 U.S. 482, 495-98 (1977); Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); Whitus v. Georgia, 385 U.S. 545, 550 (1967); Cassell v. Texas, 339 U.S. 282, 284-87 (1950); Hill v. Texas, 316 U.S. 400, 403-04 (1942).

38. 380 U.S. 202 (1965).

39. *Swain,* 380 U.S. at 223.

40. 100 U.S. 303 (1880). In *Strauder,* decided 11 years after ratification of the fourteenth amendment, the Court invalidated a state statute excluding blacks from juries on the grounds that the equal protection clause, which required that laws be the same for all persons, prohibited discrimination against blacks because of their race. The Court accordingly proscribed statutory exclusion of blacks from jury service as facially invalid because such statutes expressly denied blacks the right to serve on account of their race. The focus of the decision was on the juror's right to be exempt from discrimination by the state based solely on race.

41. *Swain,* 380 U.S. at 223.

42. *See supra* notes 13-20 and accompanying text.

43. *See Swain,* 380 U.S. at 209-22.

44. *Id.* at 222.

45. *See* State v. Washington, 375 So. 2d 1162 (La. 1979). This appears to be the only instance where a defendant used this technique successfully.

a broader issue: Is systematic and consistent use of the challenge to remove black persons from the venire constitutional? The Court noted that "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the victim may be, is responsible for the removal of Negroes . . . the purposes of the peremptory challenge are being perverted."[46] Applying this standard, the Court concluded that the record did not present a prima facie violation of the rule, even though no black person had served on a petit jury in that county since 1950, when record keeping first began.

Not surprisingly, commentary on *Swain* has been critical. Scholars fit the decision into the equal protection framework by reasoning that when there is an independent and legitimate reason for permitting a government officer to exercise discretion, the burden of proving discriminatory purpose will be much greater.[47] The *Swain* Court held that the defendant must show clear and convincing proof of discriminatory purpose before the peremptory challenge could be limited, because of its role as an essential means of achieving an impartial jury.

Since *Swain*, numerous defendants have attempted to meet the test of systematic exclusion,[48] but not surprisingly, almost all have invariably failed.[49] The heavy burden imposed by *Swain* left minority defendants in many jurisdictions without hope of having any members of their race sitting on their jury.[50] The burden of proof was simply insurmountable.

B. Sixth Amendment Analysis

When *Swain* was decided, the Court had not yet incorporated the sixth amendment right to an impartial jury[51] into the guarantees of the fourteenth amendment. However, the Court had previously recognized that the very essence of the federal jury trial right was the right to a fair trial by impartial and indifferent jurors.[52] Four years after *Swain*, in *Duncan v. Louisiana*,[53] the Court applied the sixth amendment jury trial right to the states through the fourteenth amendment, and later made clear that this protection included the right to a petit jury pool drawn

46. *Swain*, 380 U.S. at 223-24.

47. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 32, at 546.

48. *See* Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d 14 (1977).

49. *See* State v. Washington, 375 So. 2d 1162 (La. 1979) (the burden imposed by *Swain* was met); State v. Brown, 371 So. 2d 751 (La. 1979) (same).

50. *See* P. DIPERNA, JURIES ON TRIAL 174-76 (1984); J. VAN DYKE, *supra* note 5, 166-67; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 238-303 (1968); Comment, *supra* note 19; Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967).

51. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI.

52. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

53. 391 U.S. 145 (1968).

from a representative cross-section of the community.[54] Thus, the constitutional guarantee of the right to trial by an impartial jury is applicable to the states today.

On the one hand, if the actual purpose of the peremptory challenge is to ensure that the jury is impartial, then the challenge would appear to be an integral part of the jury trial right.[55] On the other hand, the peremptory challenge may actually subvert the goal of an impartial jury when used to racially discriminate against a defendant,[56] and hence under the sixth amendment should be limited to uses that are not based on race. The Court has avoided any confrontation between the sixth amendment guarantee of an impartial jury and the peremptory challenge, although *Batson* presented a ripe opportunity for such an appraisal of these apparently conflicting principles.

The circuit courts, feeling constrained to follow *Swain* in the equal protection context, have instead addressed the issue of discriminatory use of peremptory challenge under the sixth amendment.[57] The *Batson* Court expressed no view on the merits of the sixth amendment argument, but the issue appears to be foreclosed by *Lockhart v. McCree*.[58] In *Lockhart,* Justice Rehnquist indicated that the sixth amendment analysis does not support a limitation on the peremptory challenge. Discussing whether "death-qualifying" a jury conflicts with the sixth amendment fair cross-section principles, he stated:

> We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury, . . . We remain convinced

54. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

55. *Swain,* 380 U.S. at 218-21.

56. *See* Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials,* 21 HARV. C.R.-C.L. L. REV. 227, 230 (1986).

57. The Second Circuit was the first circuit to use the sixth amendment rationale for limiting discriminatory challenges. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and vacated,* 106 S. Ct. 3289 (1986). The Second Circuit followed California's lead in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). The Sixth Circuit followed the Second Circuit and agreed with *McCray.* Booker v. Jabe, 775 F.2d 762, (6th Cir. 1985), *vacated sub nom,* Michigan v. Booker, 106 S. Ct. 3289 (1986). However, the Fourth and Eighth Circuits have rejected the sixth amendment rationale. United States v. Whitfield, 715 F.2d 145, 147 (4th Cir. 1983); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983)(en banc), *cert. denied,* 464 U.S. 1063 (1984). The Supreme Court vacated both *McCray* and *Booker,* remanding *Booker* to be decided in light of Allen v. Hardy, 106 S. Ct. 2878 (1986), and *Batson,* and granting certiorari for *McCray.* The Court has again sidestepped the sixth amendment issue, but it appears to reject implicitly the proposition that the cross-section requirement extends to the selection of a petit jury.

58. 106 S. Ct. 1758 (1986).

that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, . . .[59]

Several states have struggled with *Swain* and emerged with protection for the defendant through state constitutional guarantees of a fair and impartial jury. The leading state case in this area is *People v. Wheeler*,[60] which introduced the procedure for scrutinizing peremptory challenge abuse that was eventually adopted in *Batson*. Although the sixth amendment analysis on which *Wheeler* relied is not directly applicable to the rationale in *Batson*, the standard and remedy introduced in *Wheeler* are useful in examining the potential impact of *Batson*.

In *Wheeler*, the California Supreme Court used the impartial jury concept from the sixth amendment to limit peremptory challenge abuse. In the trial of two black defendants accused of murdering a caucasian man, the prosecutor used his peremptory challenges to strike every black person from the jury. The court, basing its decision on the California Constitution, held that the use of the peremptory challenge to remove jurors solely because of alleged bias violates the right to an impartial jury, because the jury must be drawn from a representative cross-section of the community.[61] The court reasoned that a "cross-section" of the community is an integral ingredient for an impartial jury, because the "only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out."[62]

The *Wheeler* procedure for raising a prima facie claim first requires that the defendant produce as complete a record as possible of the circumstances of the case. Second, the defendant must establish that the prosecutor is excluding from the jury members of a "cognizable" group, within the meaning of the representative cross-section rule. Third, he must show from the totality of the circumstances of the case a strong likelihood that the prospective jurors are being challenged because of their race. If the defendant meets these requirements, the trial judge must determine whether the defendant has raised a reasonable inference of misuse of the peremptory challenge and, if so, the burden shifts to the prosecutor to show that the challenges were not based solely on group bias.[63]

The *Wheeler* approach has been adopted in similar form in Flor-

59. *Id.* at 1764-65 (citations omitted).

60. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

61. *Id.* at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 902-03. Article I, § 16 of the California Constitution does not explicitly guarantee trial by an impartial jury, but California courts have long recognized that the right to an impartial jury is implicit in the California Constitution. *Wheeler*, 22 Cal. 3d at 265, 583 P.2d at 757, 148 Cal. Rptr. at 895.

62. *Id.* at 266-67, 583 P.2d at 755, 148 Cal. Rptr. at 896 (footnote omitted).

63. *Id.* at 280-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 905-06.

ida,[64] Delaware,[65] and New Jersey.[66] While this approach has been criticized,[67] the procedure for checking prosecutorial abuse appears to be manageable, at least in California.[68]

III. *Batson v. Kentucky*

James Kirkland Batson, a black man, was convicted by an all white jury in a Kentucky court of second degree burglary and receipt of stolen goods. During *voir dire,* the prosecutor used peremptory challenges to excuse all four black persons on the venire.[69] Before the jury was sworn, defense counsel moved to discharge the jury on the grounds that the prosecutor's use of peremptory challenges violated Batson's sixth amendment right to a jury drawn from a cross-section of the community and his fourteenth amendment right to equal protection of the laws. The trial judge denied the motion, reasoning that the cross-section requirement does not apply to selection of the petit jury. On appeal, the Supreme Court of Kentucky rejected Batson's constitutional claims, followed *Swain* on the equal protection claim, and refused to extend cross-section analysis to the petit jury.[70]

A. The Majority Opinion

The United States Supreme Court effectively overruled a portion of *Swain v. Alabama*[71] and held that Batson had established a prima facie violation of the equal protection clause. The Court remanded the case

64. State v. Neil, 457 So. 2d 481 (Fla. 1984).

65. Riley v. State, 496 A.2d 997 (Del. 1985).

66. State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986). Although *Gilmore* was decided after *Batson,* the New Jersey Supreme Court nevertheless provided additional protection for the defendant under its state constitution.

67. An exhaustive discussion of the sixth amendment impartial jury and "cross-section" analysis is beyond the scope of this Comment. People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986), are good sources for study of the issue. For commentary, see Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges,* 38 OKLA. L. REV. 385 (1985); Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures,* 64 N.C.L. REV. 501 (1986); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation,* 41 MD. L. REV. 337 (1982); Note, *supra* note 56.

68. People v. Hall, 35 Cal. 3d 161, 169-71, 672 P.2d 854, 859-60, 197 Cal. Rptr. 71, 76-77 (1983).

69. *Batson,* 106 S. Ct. at 1715. Kentucky follows a form of the struck jury system, in which the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors. KY. R. CRIM. P. §§ 9.36, 9.38, 9.40 (Michie/Bobbs-Merrill 1983).

70. *Batson,* 106 S. Ct. at 1715.

71. 380 U.S. 202 (1965). The majority never expressly overruled *Swain v. Alabama,* but Justice White, in his concurring opinion, stated that the majority was "overturning the principle holding in *Swain*" by allowing a constitutional challenge by Batson in these circumstances. White agreed with the majority's ruling, however, because he believed *Swain* should be overruled. *Batson,* 106 S. Ct. at 1725 n.71 (White, J., concurring).

for a hearing in which the prosecutor would be required to give neutral reasons for challenging the black persons. If the prosecutor could not provide such reasons, Batson's conviction would be reversed.[72]

Justice Powell, writing for the majority, emphasized the principle first articulated in *Strauder v. West Virginia:*[73] "[T]he State denies a black defendant equal protection . . . when it puts him on trial before a jury from which members of his race have been purposely excluded."[74] Recognizing that the defendant does not have a right to a jury composed of persons of any particular race, Justice Powell insisted that the equal protection clause guarantees the defendant the right to be tried by a jury selected pursuant to nondiscriminatory criteria.[75]

The Court noted that the same rationale underlying attacks on the discriminatory procedures used in venire selection similarly invalidated discriminatory peremptory challenges, because the Constitution prohibits all forms of purposeful racial discrimination in the selection of jurors. Purposeful racial discrimination, the Court reasoned, denies the defendant the protection a jury trial was intended to secure—the right to be tried by peers, indifferently chosen. In addition, by allowing the exclusion of a juror because of his race, the state also unconstitutionally discriminates against the excluded juror.[76]

Recognizing that the principles announced in *Strauder* had never been questioned, Justice Powell focused on the evidentiary burden required of a defendant making a claim of purposeful discrimination. He pointed out that the *Swain* Court attempted to protect the peremptory nature of the challenge because of its importance as a means of achieving a qualified and unbiased jury. Relying on the presumption that the prosecutor had properly exercised the state's challenges, Justice Powell recognized, however, that the equal protection clause placed some limits on the right to challenge.[77] Because the lower courts interpreted *Swain* to require proof of repeated exclusion of a particular minority over a number of cases, the Court found that the prosecutor was virtually immune from constitutional scrutiny under the equal protection clause. As a result, the Court rejected the heavy evidentiary burden placed on the defendant under the *Swain* rationale as inconsistent with the "strict scrutiny" equal protection standards developed since *Swain.*

The *Batson* requirements for proving discriminatory purpose in the prosecutor's use of peremptory challenges parallel those articulated in the cases addressing discriminatory purpose in the selection of the ve-

72. *Batson,* 106 S. Ct. at 1725.

73. 100 U.S. 303 (1880).

74. *Batson,* 106 S. Ct. at 1716. "Exclusion of black persons from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.*

75. *Id.* at 1716-17.

76. *Id.* at 1717-18.

77. *Id.* at 1719-20.

nire.[78] Thus, the new standard allows the defendant to establish a prima facie case of discrimination solely on evidence of the prosecutor's action at his trial.[79] The Court very clearly stated the evidentiary burden the defendant must carry:

> To establish such a case, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove . . . members of [his] race . . . Finally, the defendant must show that these facts and . . . other relevant circumstances raise an inference [of exclusion on account of race].[80]

In explaining the requisite standard of proof, the Court emphasized that the trial court should consider all relevant circumstances. After the defendant has established a prima facie case of racial discrimination, the burden shifts to the state to give a neutral explanation for its challenges. The trial court must then determine if the circumstances warrant a finding of purposeful discrimination. In response to the dissenters' criticism, Justice Powell stated that this decision will not undermine the usefulness of the challenge, but will be enforceable and practical, and will strengthen the perception of fairness in the criminal justice system.[81]

B. The Concurring Opinions

Justice White, who had voted with the majority in *Swain,* concurred with the majority in *Batson.* He explained his reversal in position from *Swain* by noting the continued widespread use of the peremptory challenge for racial discriminatory purposes, despite *Swain*'s warning that the equal protection clause limits such discrimination by the states. However, he pointed out that "[m]uch litigation will be required to spell out the contours of the Court's Equal Protection holding. . . ."[82]

Justice Marshall also concurred with the majority, but advocated a stronger remedy; he would ban peremptory challenges altogether in criminal trials. Finding that the majority's remedy would only address flagrant instances of discrimination, he stated that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to abolish them entirely from the criminal justice system."[83] Because the majority opinion gives no guidence to the trial judge on how to assess the prosecutor's motives, Justice Marshall argued that the protection offered to minority defendants is illusory because the prosecutor can easily generate permissible excuses.[84]

78. *Id.* at 1721-24; *e.g.* Casteneda v. Partida, 430 U.S. 482, 494-95 (1977).
79. *Batson,* 106 S. Ct. at 1722-23.
80. *Id.* at 1723 (citations omitted).
81. *Id.* at 1723-24.
82. *Id.* at 1724-25 (White, J., concurring).
83. *Id.* at 1728 (Marshall, J., concurring).
84. *Id.* Justice Stevens' opinion, in which Justice Brennan joined, defended the decision

C. The Dissenting Opinions

Chief Justice Burger dissented in an opinion joined by Justice Rehnquist.[85] In addressing the merits, the Chief Justice emphasized the history and function of the peremptory challenge and criticized the extension of venire pool exclusion rules to petit jury exclusion through the peremptory challenge.[86] He stated that "unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case."[87] Pure equal protection analysis, he argued, would require extension of the rule to exclusions based on sex, age, religious or political affiliations, mental capacity, number of children, living arrangements, and employment in a particular industry or profession.[88] In addition, he expressed concern that the holding could not logically be limited to prosecutorial abuses,[89] and would ultimately result in "juries that the parties do not believe are truly impartial."[90]

Finally, Justice Rehnquist's dissent, in which Chief Justice Burger joined, added that "there is simply nothing 'unequal' about the State using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants . . . and so on."[91] Because the excluded blacks are not denied the right to serve as jurors in cases involving nonblack defendants, he argued, neither the excluded blacks nor the community is harmed. He saw nothing unconstitutional in using peremptory challenges based on group affiliations or racial classification as a screen for potential juror partiality, because the purpose of the peremptory challenge is to provide a method for attaining an unbiased jury. Justice Rehnquist also opined that the use of the peremptory challenge to single

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on equal protection grounds. Batson had argued that the sixth amendment should be the basis for a limitation on the challenge, and he expressly declined to rely on the equal protection clause in oral argument. Even though the petitioner did not argue the equal protection issue, because the State of Kentucky had based its argument on adherence to *Swain's* equal protection holding, Stevens thought it proper for the Court to rule on that issue. *Id.* at 1729-30 (Stevens, J., concurring). Justice O'Connor also concurred separately, adding that, in her opinion, *Batson* should apply only prospectively. *Id.* at 1731 (O'Connor, J., concurring). *Batson* was given limited retroactive effect in Griffith v. Kentucky, 107 S. Ct. 708 (1987).

85. *Batson*, 106 S. Ct. at 1731 (Burger, C.J., dissenting). Since the petitioner failed to raise an equal protection claim, Chief Justice Burger argued that the majority mistakenly ruled on that issue. Because of the importance of the issue, he felt that the equal protection decision was premature, and would have at least directed reargument of the issue. *Id.* at 1731-34. For the concurrence's response, see *id.* at 1729 (Stevens, J., concurring).

86. *Id.* at 1735-36 (Burger, C.J., dissenting).

87. *Id.* at 1737 (Burger, C.J., dissenting).

88. *Id.* (Burger, C.J., dissenting).

89. *Id.* at 1738 (Burger, C.J., dissenting).

90. *Id.* at 1740 (Burger, C.J., dissenting).

91. *Id.* at 1744 (Rehnquist, J., dissenting).

out members of a racial group does not "infringe upon any other constitutional interests."[92]

IV. *Batson's* Impact

Batson will have a practical impact on jury selection in criminal trials involving defendants who are members of a racial minority. It will require defense counsel to keep careful record of *voir dire* regarding prospective jurors' races and to pay closer attention to prosecutorial challenges. It will also require sensitive scrutiny by the trial judge to ascertain the motivation of both the prosecutor and the defense. Clearly, *Batson* will provide a racial minority defendant an opportunity to be tried by a jury on which other members of his race sit. Perhaps as significant, minority racial groups will not be denied the right to participate in criminal trials as jurors simply because of their race.

The *Batson* test conforms to current equal protection doctrine because it implicitly subjects a claim of purposeful racial discrimination in the use of a peremptory challenge to the same strict scrutiny test as required in all other claims of such discrimination. *Batson* recognizes that the constitutional rights of the defendant and the excluded juror outweigh the importance of allowing the government to have unchecked use of the peremptory challenge.[93] Since "clear and convincing" proof of discriminatory purpose in this situation is all but impossible to meet,[94] the Court accepted a lower standard of proof to raise a prima facie claim.

Nevertheless, *Batson* does not significantly alter the traditional purposes and importance of the peremptory challenge in criminal trials.[95] Even as limited by *Batson,* the "new" challenge remains an important means for achieving an impartial jury. It may still be used to strike jurors on the basis of a hunch, an assumption, or an intuitive judgment. The peremptory challenge may not, however, be used on the assumption that because the juror shares the defendant's race he will not be able to decide the case on the facts and the law.

One traditional purpose of the challenge was to permit strikes based on socially unpopular expressions of bias.[96] Although that purpose still may be acceptable after *Batson,* its use must square with the demands of the equal protection clause. This limitation not only prohibits overt

92. *Id.* at 1745 (Rehnquist, J., dissenting).

93. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 32, at 546. "[F]ew governmental interests, other than a possible interest in protection of human life, could justify any use of such [racial] classifications." *Id.* at 580 n.119.

94. *See supra* text accompanying notes 46-50.

95. *See supra* notes 21-28 and accompanying text.

96. *See supra* notes 25-28 and accompanying text. Chief Justice Burger considers this a strong reason for leaving the peremptory challenge untouched. *Batson,* 106 S. Ct. at 1735-36 (Burger, C.J., dissenting).

manifestations of discrimination, but also extends to obscured, subjective uses of the challenge by state officers. For example, when used to exclude jurors on the basis of impermissible discrimination, the challenge is not exempt from equal protection scrutiny simply because other permissible uses of the challenge obscure that discriminatory use. When the challenge is applied without any discriminatory motives, however, it may still be used to exclude a juror whose occupation, economic status, sex, age, or appearance, indicate that he might not be impartial.[97]

Historically, another purpose of the peremptory challenge was to satisfy the defendant that his jury would be fair. The *Batson* decision does not frustrate this goal since it does not limit the defendant's use of the challenge.[98] Indeed, because this goal was the very foundation for the challenge,[99] it is imperative that the defendant's challenge remain unfettered.

The final traditionally recognized purpose of the peremptory challenge was to act as a supplement to the cause challenge.[100] Even after *Batson,* a prosecutor may use a peremptory challenge to strike a particular juror, regardless of the juror's race, who has been alienated by the prosecutor's questioning. Thus, vigorous *voir dire* remains an important tool for attaining an impartial jury.

Notably, *Batson* is limited to claims that members of a racial minority have been impermissibly excluded. It does not apply to discrimination claims by members of other types of groups besides racial minorities, a defect in the majority's reasoning charged by Chief Justice Burger in his dissent.[101] However, the *Batson* test need not be extended to groups classified by sex, age, and religious or political affiliations, for example, because the equal protection clause does not require that the same level of scutiny be applied to these classifications. When classifications by *race* are challenged under the equal protection clause, the test is one of strict scrutiny. The governmental interest in maintaining the classification will be upheld only if it is compelling—for example, when the law aims to

97. *See supra* note 25-28.

98. *Batson,* 106 S. Ct. at 1718-19; *see infra* notes 105-07 and accompanying text.

99. *See supra* notes 13-20 and accompanying text.

100. *See supra* text accompanying note 28.

101. *Batson,* 106 S. Ct. at 1737 (Burger, C.J., dissenting); *see supra* notes 86-90 and accompanying text. By limiting the holding to racial groups, the Court avoids the arguments raised against state court decisions based on the right to trial by a jury drawn from a cross-section of the community. When the exclusion of potential jurors is based on the cross-section argument, the exclusion of any "cognizable," People v. Wheeler, 22 Cal. 3d 258, 276-78, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 902-03 (1978) or "discrete," Commonwealth v. Soares, 377 Mass. 461, 487-88, 387 N.E.2d 499, 15-16 (1979), *cert. denied sub nom.* Massachusetts v. Soares, 444 U.S. 881 (1979), group cannot be limited to racial minorities, but logically extends to groupings by sex, age, religious or political affiliations, and so forth. *See* Saltzburg & Powers, *supra* note 67, at 363-64.

protect human life.[102] In contrast, the Court analyzes classifications based on sex, age, and religious or political affiliation with a lesser degree of scrutiny. For these groupings, the Court requires only that the classification have a "rational basis" or bears a "substantial relationship" to the governmental end to be achieved by such classification.[103] For example, suppose a defendant claimed that young potential jurors were being stricken by the prosecutor. Under an equal protection analysis, the Court would ask only whether the prosecutor had a rational basis for making such a challenge, because discrimination on the basis of age is not "invidious" discrimination traditionally subject to strict scrutiny under the equal protection clause.[104] Of course, the Court could still invalidate peremptory challenges based on age, gender, and religious or political affiliation when these classifications do not bear even a rational or substantial relationship to the governmental end to achieve an "impartial" jury.

The *Batson* holding applies only to the prosecutorial use of the peremptory challenge in a racially discriminatory manner because equal protection analysis applies only to the activites of the local, state, or federal government. It does not apply to actions by persons not connected to the government.[105] Thus, the defendant may eliminate via the peremptory challenge all racial minorities without violating the fourteenth amendment. States that limit the peremptory challenge based on the right to an impartial jury under the sixth amendment, however, require that both the prosecution's and the defendant's peremptory challenges be limited when they are based on impermissible group bias.[106] Because the *Batson* holding applies an equal protection rather than a sixth amend-

102. *See supra* note 93.

103. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 32 at 530-33. Traditionally, the Court used the "rational basis" test for classifications in economic legislation, while the "strict scrutiny" test was applied to suspect classifications, those using race or national origin as determinative of the allocation of burdens or benefits under the law. More recently the Court has applied a middle level standard of review, requiring that some non-suspect classifications be "substantially related" to the purposes of the law. This test remains somewhat unclear, but appears to have been used in cases involving gender-based classifications, Craig v. Boren, 429 U.S. 190, 197 (1976), illegitimacy, Lalli v. Lalli, 439 U.S. 259, 265 (1978), and alienage, Plyler v. Doe, 457 U.S. 202, 216-24 (1982). The strict scrutiny test, however, is applied only to classifications based on a trait that contravenes established constitutional principles, and is most strictly applied in classifications based on race or national origin. This test underlies the decisions in the jury selection line of cases from *Strauder* to *Batson.*

104. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 32, at 557 n.34.

105. *Id.* at 556.

106. Those courts limiting the defendant's use of peremptory challenges reason that the state also has an implied right to a jury trial, which necessarily includes the right to an impartial jury. *E.g.*, People v. Wheeler, 22 Cal. 3d 258, 280-82 n.29, 583 P.2d 748, 764-65 n.29, 148 Cal. Rptr. 890, 905-07 n.29 (1978). Hence, limitations on the peremptory challenge based on impartial jury principles apply equally to the defendant's use of the challenge. *See* Doyel, *supra* note 67, at 443.

ment analysis, it is more limited in scope than its counterparts in the state systems.[107]

To summarize, implicit in *Batson* is the Court's determination that discrimination based on race is subject to strict scrutiny.[108] Because other classifications do not merit the same protection under the equal protection clause, the *Batson* decision will not necessarily be extended to them. Hence, Chief Justice Burger's criticism that the majority argument must extend to those groups is unfounded.[109] Finally, the *Batson* decision appropriately limits only the prosecutor's challenges, since the equal protection clause applies only to governmental actions.

V. Post-*Batson:* Inconsistency and Uncertainty

The *Batson* decision improves the probability that a minority defendant will have jurors of his race participate in deciding his fate. However, the prima facie requirements for an objection under *Batson* appear to allow racial discrimination in some circumstances, despite the Court's admonition that no invidious act of discrimination should be permitted. This section examines these circumstances and proposes an interpretation of *Batson* that gives the fullest effect to the spirit of the decision.

A. Flaws in the Standard

There are two important flaws in the *Batson* standard. First, the requirement that the defendant and the excluded juror be of the same race unduly restricts the ability of the defendant to raise the inference of impermissible discrimination. Second, that requirement may be interpreted as limiting standing to minority defendants.

By requiring that both the defendant and the impermissibly excluded jurors be of the same racial minority,[110] unredressed discrimination could result. For example, if an Hispanic defendant raises an equal protection argument alleging that all minority potential jurors were excluded by the prosecutor, in a case in which all of two blacks and two Hispanics had been challenged in the selection of the defendant's jury, only the challenges to the Hispanic members would be analyzed under *Batson.* When the prosecutor excludes only two Hispanics and two blacks, resulting in an all white jury, the pattern recognized under *Batson* shows only two impermissible challenges to the two Hispanics, while the total incidents of racial discrimination in this hypothetical case is actu-

107. Likewise, *Batson* supplies no support for limiting peremptory challenges in civil trials. Attempts to limit either the defendant's challenges in criminal trials or either party's challenges in civil trials would have to be supported by impartial jury and cross-section arguments.

108. *Batson,* 106 S. Ct. at 1716-19.

109. *Id.* at 1737.

110. *Id.* at 1723.

ally four (including the blacks).[111] A trial judge addressing only the quantity of strikes against the defendant's racial group may well decide that a prima facie showing is not made by so few strikes. In this case, not only may the defendant be denied equal protection, although the statistics indicate that the prosecutor is excluding *all* minorities, but the jurors of other minorities could also be impermissibly excluded. Such a result is difficult to square with the principle first recognized in *Strauder v. West Virginia*[112] that denying a person participation in jury service because of his race results in unconstitutional discrimination against the excluded juror under the equal protection clause. Even though both the jurors' and the defendant's rights may have been violated, under *Batson* the defendant may not compel the prosecutor to explain his actions because the number of questionable challenges alone may not be adequate to raise an inference of discrimination.

Finally, *Batson* requires that to raise a claim of discrimination the defendant must belong to a cognizable racial group. In an earlier decision in a venire selection case, *Peters v. Kiff*,[113] the Court held that it is unnecessary for the defendant to share the characteristics of jurors impermissibly excluded from the jury pool. In *Peters,* the Court stated, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race . . . ."[114] The Court reasoned that "the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases."[115] Thus, in *Peters* a white defendant had standing to challenge exclusion of blacks from the jury venire, and successfully did so. The *Peters* holding was grounded in the sixth amendment right to an impartial jury, but the reasoning appears equally persuasive in the peremptory challenge context, where jury selection is limited on equal protection grounds. In addition, if one of the main goals of *Batson* is to protect the

111. *Compare* State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980) (challenge of the only black, prospective juror is insufficient to raise an inference of improper use of the peremptory challenge under a test substantially the same as that required by *Batson* for establishing a prima facie case) *and* Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-10 (1981) (no prima facie violation where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury).

112. 100 U.S. 303, 307-08 (1880).

113. 407 U.S. 493, 504 (1972); *see also* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (male has standing to challenge jury from which females have been excluded); Annotation, *Standing of Criminal Defendant to Challenge, on Constitutional Grounds, Discriminatory Composition of Federal Grand Jury Where Defendant is not a Member of Class Allegedly Excluded,* 68 A.L.R. FED. 175 (1974).

114. *Peters,* 407 U.S. at 504.

115. *Id.* at 503.

excluded juror from invidious discrimination, then limiting the rule to minority defendants does not serve that purpose in cases in which the excluded jurors are not members of the defendant's race, or the defendant himself is not a member of a minority race, but the excluded jurors are. The motivation behind the holdings in the cases from *Strauder* to *Batson* was to protect the jurors as well as the defendants from discrimination. When an impermissibly excluded juror has been denied his right to participate in the legal system, however, he is not likely to challenge the prosecutor's actions himself. Only by allowing the defendant to raise the claim can the purposes of *Strauder* and *Batson* be achieved. To fully protect both the jurors and the defendants, *Batson* should not be limited to minority defendants.

B. The Evidentiary Burden under *Batson*

Batson reverses *Swain* in reaching the conclusion that the evidentiary burden on the defendant may be met by introducing evidence of purposeful racial discrimination in his case only.[116] The Court's reason for the departure from *Swain* was that "a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions."[117] Because a single act of invidious discrimination is violative of the equal protection clause, the defendant can support a prima facie case of discrimination "solely on evidence concerning the prosecutor's exercise of the peremptory challenges at the defendant's trial."[118]

The same reasoning should apply to protect jurors who are excluded because of their race. *Batson* attempts to "ensure that no citizen is disqualified from jury service because of his race,"[119] yet provides a standard that is not failsafe. For example, if the venire contains only one black person who is peremptorily challenged by the prosecutor, the *Batson* test for a prima facie violation could result in that challenge being "immunized by the absence of such discrimination in the making of other comparable decisions."[120] The standard appears imperfect because a single discriminatory challenge may slip through the cracks, since the trial judge may not find a pattern that establishes a prima facie case of discrimination. This shortcoming need not be fatal, however, because the *Batson* reasoning, if applied with this potential problem in mind, can

116. *See supra* text accompanying note 43-45.

117. *Batson,* 106 S. Ct. at 1722 (quoting Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977)).

118. *Batson,* 106 S. Ct. at 1722-23.

119. *Id.* at 1724.

120. *See* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977).

be interpreted broadly enough to protect against even a single misuse of the prosecutor's challenge based on race.[121]

Justice White predicts that much litigation will follow to spell out the contours of *Batson.*[122] Much of this litigation likely will focus on how far the standard should be extended to protect the defendant and the juror from even a single invidious act contravening the requirements of the equal protection clause. The remainder of this Comment focuses on how trial and appellate courts should apply the *Batson* standard to best effectuate its spirit, suggesting a liberal attitude toward the defendant's burden and a strict attitude toward the prosecutor's rebuttal.

1. What Constitutes a Prima Facie Case?

Batson allows the defendant to establish a case of purposeful discrimination solely on evidence derived from his case. He must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. This evidence is purely factual, and should pose no problems if the proceedings are properly documented.[123] To achieve this documentation, *voir dire* must be recorded, objections to possibly impermissible strikes must be made in a timely manner, and the trial judge must keep track of the race of all potential jurors challenged peremptorily by the prosecution. If these steps are taken, the trial judge can make an accurate assessment of the evidence, and the record will allow for meaningful appellate review.

Batson also permits the defendant to show relevant circumstances that raise an inference of discrimination by the prosecutor.[124] The Court gives some illustrative examples of circumstances that would raise such an inference: a pattern of strikes against black jurors, or the prosecutor's questions and statements during *voir dire* and in the exercise of the challenge itself.[125] Allowing the defendant to make that inference significantly eases the prima facie burden of proving discrimination. Although trial judges may be rightly concerned about the defensive use of such claims for dilatory purposes, *Batson* requires that equal protection concerns be given careful attention. Clearly, the Court intended that the

121. *See infra* notes 123-43 and accompanying text.

122. *Batson,* 106 S. Ct. at 1725 (White, J., concurring).

123. A few defendants seeking protection under *Batson* have already faced this requirement. *See* Williams v. State, 712 S.W.2d 835, 840 (Tex. 1986) (*Batson* analysis was foreclosed because the defendant did not object to peremptory challenges immediately after they were made); Bueno-Hernandez v. State, 724 P.2d 1132, 1133 (Wyo. 1986) (since *voir dire* was not recorded and the only evidence regarding racially based challenges was that three of those venire persons challenged had spanish surnames, no relief was granted).

124. *Batson,* 106 S. Ct. at 1723.

125. *Id.* The Court was quick to caution that "[t]hese examples are merely illustrative."

trial judge should not place too great a burden of proof on the defendant at this stage.

In cases in which the defendant has a significant amount of quantitative evidence, the prima facie requirements will be easily met. For example, in a case involving a black defendant and a white victim where the prosecution challenges twelve of thirteen prospective black jurors,[126] the inference is obvious from the statistical data alone. The inference is less clear however, in a case in which the state peremptorily challenges all black, prospective jurors so that the black defendant is tried by an all white jury, but the crime involves a *black* victim.[127] Similarly, other difficult cases will inevitably arise. What result when twenty-nine potential jurors are questioned, four of whom are black, where three of those were peremptorily stricken?[128] When the *only* black prospective juror is stricken, leaving an all white jury?[129] Clearly the test is meaningful only if courts apply qualitative as well as quantitative factors to identify racial discrimination. It is therefore imperative that the trial judge find a prima facie showing on minimal evidence of discrimination. To do otherwise will probably foreclose reasonable inquiry into the defendant's claims, and possibly "immunize" a single invidious act.[130]

Batson permits the prosecutor to rebut the prima facie showing. Requiring an immediate response by the prosecutor to rebut the showing seems to drastically curtail the "peremptory" nature of the challenge by virtually requiring an explanation whenever the state challenges a minority juror in a case involving a defendant of the same race. But *Batson* requires that the challenge be so limited because of the inherent danger of its use to discriminate by race.[131] Since even one instance of such discrimination contravenes the equal protection clause, such a use must not be allowed. Moreover, meaningful appellate review is impossible without

126. *See* Commonwealth v. Soares, 377 Mass. 461, 473, 387 N.E.2d 499, 508, *cert. denied sub nom.* Massachusetts v. Soares, 444 U.S. 881 (1979).

127. *See* Commonwealth v. McKendrick, 356 Pa. Super. 64, 71-72, 514 A.2d 144, 150-51 (1986) (no prima facie case of discrimination found). Racial bias by jurors would appear to be less problematic when the crime is not interracial; however, juror attitudes against minority defendants do not necessarily correlate with the race of the victim. Trial lawyers are advised that "[b]lacks tend to be . . . prodefendant in criminal trials, and sympathetic to the 'underdog' . . . . Middle aged and younger [b]lacks tend to believe that the law and the police aren't always right." R. WENKE, *supra* note 10, at 76.

128. People v. Clay, 153 Cal. App. 3d 433, 455, 200 Cal. Rptr. 269, 278-79 (1984) (prima facie case established).

129. State v. Davis, 99 N.M. 522, 525, 660 P.2d 612, 615 (Ct. App. 1983), *cert. denied,* 99 N.M. 578, 661 P.2d 478 (1983); State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980) (no prima facie case established) (challenge of the only black venireperson not a prima facie case, despite the fact that the prosecutor did not even question him).

130. This result would substantiate Justice Marshall's fears. *See supra* text accompanying notes 83-84.

131. *Batson,* 106 S. Ct. at 1723-24 n.20.

the prosecutor's response to the prima facie claim.[132] Thus a trial judge should demand an explanation from the prosecutor in nearly every instance in which a defendant objects to the challenge of even one member of a minority race.

Appellate review of the trial court's decision should be necessarily narrow under *Batson.* The trial court's determination of discrimination is a question of fact, and "[s]ince the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."[133] The appellate court's ability to review the circumstances of the case depends, of course, on the adequacy of the record, but even when the record is complete, nuances in the proceedings will be lost when reduced to writing. For example, when the trial court fails to demand a rebuttal by the prosecutor, but the defendant has nevertheless made a prima facie showing, the reviewing court will be hampered in its assessment of the prosecutor's purpose. In addition to inquiring into the prosecutor's motives, the appellate court in such a case must also consider whether the trial judge's decision itself was tainted by racial bias or merely by misunderstanding the import of *Batson.*

Because the spirit of *Batson* attempts to prevent even one instance of invidious racial discrimination, a reviewing court should remand the case for fact finding if there is the slightest evidence of such discrimination for which the trial court did not demand an explanation. The court required this result in *Batson* itself, when the record quantitatively showed obvious discrimination and the trial judge failed to demand a response from the prosecutor. But there are, however, closer cases, such as when the reviewing court does not provide the defendant with a hearing on the issue when the defendant merely showed that the only black had been excluded,[134] or when both the defendant and the victim were black and all black prospective jurors are stricken, resulting in a trial by an all white jury.[135] In such cases, where the numerical pattern does not give a clear indication of race-neutral challenges, the trial court's failure to hold a hearing on the issue warrants remand, despite the court's emphasis on deference that must be afforded to the trial court's decision.

132. *See infra* text accompanying notes 134-136.

133. *Batson,* 106 S. Ct. at 1724 n.21.

134. State v. Crespin, 94 N.M. 486, 488-89, 612 P.2d 716, 718 (Ct. App. 1980).

135. Commonwealth v. McKendrick, 356 Pa. Super. 64, 71-72, 514 A.2d 144, 150-51 (1986). The appellate court relied on the trial court's assertion that "this was not a case involving an interracial killing in which specific racial groups would be prone to take sides of prejudice." *Id.* at 151. The appellate court applied the *Batson* standard, but should not have based its decision on the trial judge's opinion of whether the prosecutor had any reason to discriminate. It is the prosecutor's motives that are under scrutiny here, not merely the appearance of a fair trial. Accordingly, the defendant should have been granted a hearing at which the prosecutor would be required to give racially neutral reasons for his peremptory challenges of all the black potential jurors.

2. What Rebuttal is Required of the Prosecutor?

Once the defendant makes a prima facie showing of purposeful racial discrimination, under *Batson* the burden shifts to the state to rebut the allegation. Although the rebuttal need not rise to the level justifying a cause challenge,[136] the prosecutor must justify the challenge on more than the assumption that the juror could not be impartial because of his race. The prosecutor must "articulate a neutral explanation"[137] that must be "clear and reasonably specific" and "legitimate."[138] From this explanation, the trial judge must perform the difficult task of determining the prosecutor's motives.

The experience in California, which uses a similar standard, provides some indication of how trial judges have treated the prosecutor's rebuttal statement. In *People v. Wheeler,*[139] the California Supreme Court stated that the prosecutor could rebut the inference of misuse of the challenge by giving an explanation reasonably relevant to the particular case, its parties, or witnesses. The prosecutor would not rebut the prima facie showing, however, if his justifications were merely "sham excuses belatedly contrived to avoid admitting acts of group discrimination."[140] The court more fully explained the rebuttal requirement in the later case of *People v. Hall.*[141] Reversing the lower court because it accepted the prosecutor's statements at face value, the *Hall* court rejected the notion that the prosecutor shows impermissible bias only when he declares an intent to exclude all members of an ethnic group. Thus, the California Supreme Court requires the lower courts to make the determination of discrimination based on the circumstances, not merely on the prosecutor's statement of his reasons.[142]

Trial courts applying the *Batson* standard will face the same difficulty when a prosecutor gives vague reasons for his challenges. Justice Marshall considered this problem to be further proof that *Batson* will not provide sufficient protection for the defendant.[143] If the judge applies *Batson* properly, however, meaningful rebuttal will be required. To accomplish this goal the trial judge should note all the circumstances rele-

136. *See supra* note 9 and accompanying text.

137. *Batson,* 106 S. Ct. at 1723.

138. *Id.* at 1723 n.2 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

139. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890, (1978); *see supra* notes 60-63 and accompanying text.

140. *Wheeler,* 22 Cal. 3d at 282-83, 583 P.2d at 765, 148 Cal. Rptr. at 906.

141. 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983).

142. Compare the statements proffered by the prosecutor in People v. Hall, 35 Cal. 3d 161, 165-66, 672 P.2d 854, 856, 197 Cal. Rptr. 71, 73-74 (1983) (prima facie case not rebutted), with those set forth in People v. Clay, 153 Cal. App. 3d 433, 451-53, 200 Cal. Rptr. 269, 276-77 (1984) (prima facie case rebutted).

143. *Batson,* 106 S. Ct. at 1728 (Marshall, J., concurring).

vant to discrimination in the particular case, among other things keeping a record of the prosecutor's questions of prospective jurors, and of which jurors were retained and which were excluded. The adequacy of the prosecutor's rebuttal to the discrimination claim will depend on the questions he has asked of all the venirepersons. Where the prosecutor lays an adequate foundation for a peremptory challenge based on a hunch or an intuitive judgment that the juror will not be fair to the state, his rebuttal response to the trial judge should be accepted.

To demonstrate the standard, suppose, for example, that a prosecutor asks generally whether any of the potential jurors will be influenced by the fact that the case involves an interracial crime. The potential jurors all respond that they will be able to try the case fairly. The prosecutor then strikes all the blacks, but no whites, from the panel. If the prosecutor attempts to rebut the defense's resulting discrimination claim by stating that he believes that all the black jurors are now hostile to the state, the trial judge should not accept such a response. By contrast, if the prosecutor strikes only one or two of several potential black jurors and justifies the exclusion by stating that those particular jurors seemed to be alienated by his questioning, that response would be acceptable if supported by some additional, objective fact. The trial court would therefore require the prosecutor to show that the challenge was based on some factor, other than race, that is indicative of partiality. In this situation, even if only one or two black potential jurors are challenged, the judge should still demand a response if the defendant raises a claim under *Batson.* Without a record of the rebuttal, meaningful decisions by the trial judge and the appellate court are impossible.

C. Appropriate Remedy

Batson provides no guidance for the trial courts when the prosecutor fails to rebut the prima facie showing of purposeful racial discrimination.[144] The court may choose from three possible remedies: it may call a new venire; it may bring in additional venirepersons of the same race as those excluded to replace the improperly excluded jurors; or it may reinstate the improperly excluded jurors.

The state courts that rely on impartial jury and fair cross–section principles require discharge of the tainted venire, and replacement with a new venire. Despite the cost in time and money, this route is necessary because the venire is no longer representative of the community after minority jurors have been stricken.[145] Equal protection principles do not require such a step, because whether the jury is "representative of a

144. *Batson*, 106 S. Ct. at 1724 n.24.

145. A number of states require that the venire be dismissed and that jury be selected from a new venire. *See* People v.Wheeler, 22 Cal. 3d 258, 282, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978); Riley v. State, 496 A.2d 997, 1013 (Del. 1985); Commonwealth v. Soares, 377

cross-section of the community" is not in issue. Under equal protection principles, the wrong to be remedied is the state's impermissible exclusion of the juror because of his race.

The second alternative, bringing in additional venirepersons to replace those impermissibly excluded, is certainly less costly and time-consuming than choosing an entirely new venire. However this remedy does not appear to be practical for three reasons. First, the new, prospective jurors are still subject to challenge for cause or peremptory challenges that are not based on racially discriminatory motives. Moreover, the new, prospective jurors may suspect that they are being brought into the proceedings because of a racially discriminatory act, if it is obvious that they were especially selected to join the existing group. Hence, these new jurors may be hostile to the prosecutor. Finally, this alternative will not completely satisfy equal protection demands because it will not remedy the excluded juror's constitutional claims.

Because the state has violated the defendant's and the juror's constitutional rights by applying the law in an invidiously discriminatory manner, the thrust of *Batson* seems to require the third alternative remedy: reinstatement of the excluded juror. The disadvantage of this alternative is that the excluded juror may well suspect that the prosecutor attempted to exclude him because of his race. Hence he may now be hostile to the prosecution. Nonetheless, reinstatment is the best solution, even though it may hamper the prosecutor's ability to mold the jury to her liking. If the prosecutor knows that a challenge that cannot survive under *Batson* will result in reinstatement of a potentially hostile juror, she will be more careful in exercising her peremptory challenges. The import of the rule is that state officers must be especially careful about conscious and unconscious racial discrimination in jury selection. The specter of reseating the impermissibly excluded juror provides sufficient inducement to refrain from discrimintory practices, and thus is the best response to an impermissible challenge. By requiring this remedy, perhaps prosecutors will view the price of racially based challenges as too great, even if a successful equal protection challenge is not certain under *Batson.*

Conclusion

The peremptory challenge serves an important function in jury selection today. It has been a part of the jury system for hundreds of years, and the Supreme Court has been hesitant to tamper with it because of its importance as a tool for selecting an impartial jury. Nevertheless, in *Batson* the Court properly limited the prosecutor's ability to use the peremp-

Mass. 461, 491, 387 N.E.2d 499, 518, *cert. denied sub. nom.* Massachusetts v. Soares, 444 U.S. 881 (1979); State v. Gilmore, 103 N.J. 508, 539, 511 A.2d 1150, 1166-67 (1986).

tory challenge, in accord with the demands of modern equal protection analysis.

Batson will have a significant effect on the prosecutor's use of peremptory challenges. The decision comports with the developments in the equal protection doctrine that have occurred since *Swain v. Alabama*,[146] and is appropriately restricted to equal protection claims based on racial discrimination. Likewise, its application to the prosecutor alone, and not the defendant, is appropriate.

There are problems with the decision, however. First, it appears to limit discriminatory claims to cases in which the defendant and the excluded jurors are of the same race, contrary to the principles of *Strauder v. West Virginia*.[147] Second, the decision requires that the defendant belong to a minority race, therefore failing to protect minority prospective jurors against potential discrimination in cases in which the defendant is white.

The other major problem with the decision is its vague standard, which gives little direction to the lower courts. To carry out the spirit of the decision, the trial court should require the defendant to make only a minimal showing to establish a prima facie case, and also strictly scrutinize the prosecutor's rebuttal. Only when the prosecutor must give a meaningful response to the defendant's objection does the appellate court have an adequate basis to properly review the discrimination claim.

The goal of *Batson* is not to force the prosecutor to refrain from using peremptory challenges. Rather, *Batson* seeks to stop invidious racial discrimination in criminal trials. Properly implemented, *Batson* will encourage the proper use of the peremptory challenge in criminal trials, and will increase society's perception of fairness in the criminal justice system.

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146. 308 U.S. 202 (1965).
147. 100 U.S. 303 (1880).
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